

RECEIVED
CENTRAL FAX CENTER

AUG 01 2006

REMARKS

In the final office action dated June 1, 2006, claims 1-21 were pending. Claims 8, 18 and 19 were indicated as allowable but objected to for depending from a rejected base claims. Claims 1-7, 9-17, 20 and 21 stand finally rejected. Reconsideration of the final rejection of these claims is respectfully requested.

Claims 1-4, 6-7, and 9 were rejected as being anticipated by U.S. Patent No. 5,700,264 to Zucherman et al. Claim 1 is directed to a method for preparing a spinal disc space and recites: "inserting a body portion of a distractor into the spinal disc space with an upper surface of the body portion adjacent an endplate of an upper vertebra and a lower surface of the body portion adjacent an endplate of a lower vertebra; advancing a cutting instrument over the body portion to remove material between at least one of the upper and lower surfaces of the body portion and the adjacent vertebra; and depositing cut material into a cavity formed in the body portion, the cavity opening toward at least one of the upper and lower surfaces." The final office action asserts that "it is possible for bore 64 to contain bone and disk tissue, even though it is occupied by post 26." Whether or not bone material and disk material can occupy bore 64 simultaneously with post 26, there is no disclosure in Zucherman et al. that bore 64 opens toward any surface of the spacer 62 that is oriented toward an adjacent endplate of upper and lower vertebrae. Rather, bore 64 extends longitudinally along spacer 62, and opens at the leading and trailing ends of the spacer 62 to allow the post 26 to extend therethrough. Spacer 62 has a solid body extending around bore 64, as plainly shown by the section view of spacer 62 in Figure 8. Fig. 11 clearly shows that bore 64 of spacer 62 does not open toward at least one of the upper and lower surfaces of the spacer, but rather opens at a leading end of the spacer that is orthogonal to the upper and lower surfaces about which cutting instrument 34 is moved.

The final office action asserts that col. 4, lines 61-64 discloses a cavity opening toward the upper and lower surfaces of the spacer 62. However, as demonstrated above, there is no disclosure of this feature. Nor is there any disclosure of "depositing cut material into a cavity formed in the body portion, the cavity opening toward at least one

Response to Final Office Action
USSN 10/625,418
Atty Docket No. MSDI-52/PC459.06
Page 7 of 9

of the upper and lower surfaces.” Therefore, a prima facie case of anticipation of claim 1 has not been established, and withdrawal of the rejection is proper along with the rejection of claims 2-4, 6-7 and 9 depending therefrom.

Claims 16-17 and 20-21 were rejected as being anticipated by U.S. Patent No. 5,722,977 to Wilhelmy. Amended claim 16 recites “inserting a body portion of a distractor into the spinal disc space with a distal end wall of the body portion in the spinal disc space; advancing a cutting instrument over the body portion into the spinal disc space; and limiting advancement of the cutting instrument into the spinal disc space by contacting the cutting instrument with the distal end wall of the body portion inserted in the spinal disc space.” In Wilhelmy the surface 27 is located outside the disc space. Therefore, Wilhelmy does not disclose claim 16 or claims 17 and 20-21 depending therefrom, and withdrawal of this basis of the rejection is respectfully requested.

Claims 10-15 were rejected as being anticipated by U.S. Patent No. 5,423,825 to Levine. Claim 10 has been amended and recites “providing a distractor insertable into the disc space, the distractor including a body portion extending between a leading end and a trailing end, the distractor further including at least one flange extending from the leading end towards the trailing end of the body portion, the at least one flange forming a slot along the body portion; and providing a cutting instrument advanceable over the body portion from the trailing end into the slot formed between the body portion and the at least one flange of the distractor; and advancing the cutting instrument from the trailing end of the distractor toward the leading end of the distractor with the leading end of the distractor in the disc space.” Since claim 10 recites the orientation of the leading end of the distractor relative to the disc space and the direction of advancement of the cutter, the orientation of the trailing and leading ends must be considered as recited in the claim. Levine fails to disclose a method having the steps recited in claim 10, and therefore cannot anticipate claim 10 or claims 11-15 depending therefrom.


Claims 1-7 were rejected under 35 USC 103(a) as being unpatentable over Wilhelmy in view of U.S. Patent No. 6,641,582 to Hanson et al. The office action admits that Wilhelmy does not disclose depositing cut material into a cavity formed in the body portion. It is respectfully submitted that Hanson et al. fails to supply any teaching or

Response to Final Office Action
USSN 10/625,418
Atty Docket No. MSDI-52/PC459.06
Page 8 of 9

disclosure that addresses this deficiency in Wilhelmy. In Hanson et al. instrument 10 includes paddles 20, 21 defining a height P_H between edges 44a, 44b and edges 45a, 45b, respectively. These edges contact the vertebral endplates to provide distraction. Between the opposite edges 44a, 45a and opposite edges 44b, 45b, the instrument includes a cutting edge 23 that extends beyond the height dimension P_H . Openings 24 are thus formed in the portion of the instrument that forms cutting edge 23, and move along with the instrument as it is advanced into the disc space. In order to cut bone material, the instrument 10 is rotated about its longitudinal axis. Hanson thus teaches a rotary cutter that is formed as an integral part of the distractor, and further discloses collecting bone debris by rotating the distractor. There would be no motivation or desire to provide this additional cutting instrument in combination with the cutting instrument of Wilhelmy. Accordingly, one skilled in the art would not look to employ the cutter of Hanson with the cutter in Wilhelmy since the cutters provide cuts of different shapes and further results in replication of the cutting function. Accordingly, claim 1 along with claims 2-7 depending therefrom are not rendered obvious by the combination of Wilhelmy and Hanson.

Reconsideration of the present application as amended and including claims 1-21 in view of this response is respectfully requested. The Examiner is encouraged to contact the undersigned by telephone to resolve any outstanding matters concerning the present application.

Respectfully submitted:



Douglas A. Collier

Reg. No. 43,556

Krieg DeVault LLP

One Indiana Square, Suite 2800

Indianapolis, Indiana 46204-2079

Bus.: (317) 238-6333

Response to Final Office Action
USSN 10/625,418
Atty Docket No. MSDI-52/PC459.06
Page 9 of 9